No. 47

Office-Supreme Court, U.S.
FILED
SEP 23 1960
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

LAWRENCE CALLANAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (R. 33-40) is reported at 274 F. 2d 601. The opinion of the district court (R. 21-31) is reported at 173 F. Supp. 98. The original conviction was affirmed at 223 F. 2d 171, certiorari denied, 350 U.S. 862.

JURISDICTION

The judgment of the court of appeals was entered February 2, 1960. The petition for a writ of cer-

tiorari was filed March 1, 1960, and was granted on April 4, 1960 (R. 42, 362 U.S. 939). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether consecutive sentences could properly be imposed on convictions for conspiracy to violate the Hobbs Anti-Racketeering Act and for a substantive extortion offense thereunder.

STATUTES AND RULE INVOLVED

18 U.S.C. 1951(a), commonly called the Hobbs Anti-Racketeering Act, as revised in 1948, provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (Subsection (b) defines robbery, extortion and commerce.)

The Hobbs Act, as passed, 60 Stat. 420, read in pertinent part:[1]

> Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce,

[1] Section 1 contained the definitions of commerce, robbery, and extortion.

by robbery or extortion, shall be guilty of a felony.

Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

Sec. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both.

The predecessor of the Hobbs Act—the Anti-Racketeering Act of 1934, 48 Stat. 979-980—read in pertinent part:

That the term "trade or commerce", as used herein, is defined to mean trade or commerce between any States, with foreign nations, in the District of Columbia, in any Territory of the United States, between any such Territory or the District of Columbia and any State or other Territory, and all other trade or commerce over which the United States has constitutional jurisdiction.

Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use

of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

* * * *

18 U.S.C. 371 provides:

Conspiracy to commit offense or to defraud United States.

If two or more person conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The conspiracy statute applicable in 1934, 35 Stat. 1096, read:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

Rule 35 of the Federal Rules of Criminal Procedure provides:

> *Correction or Reduction of Sentence*
>
> The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

STATEMENT

On March 3, 1954, the petitioner and others were indicted under a two-count indictment in the United States District Court for the Eastern District of Missouri (R. 1-9). Count I charged a conspiracy between the petitioner and four others to violate the Hobbs Anti-Racketeering Act, 18 U.S.C. 1951 (R. 1-6). Count II charged the petitioner and others with a substantive offense of extortion under the provisions of the same Act (R. 6-9).

On July 19, 1954, after conviction by a jury,[2] the petitioner was sentenced to consecutive terms of 12 years on Count I and 12 years on Count II. However, execution of the sentence on Count II was suspended, and the petitioner was placed on probation for 5 years to commence with his release under Count I (R. 10-11). The conviction was affirmed on appeal. 223 F. 2d 171 (C.A. 8), certiorari denied, 350 U.S. 862.

On December 17, 1958, the petitioner filed a motion invoking the provisions of either Rule 35, F. R. Crim. P., or 28 U.S.C. 2255, for correction of his sentence on Count I (R. 11-13). He claimed that Count I charged a conspiracy to commit the same offense set forth in Count II (R. 12-item (4)); that the maximum penalty under the Act for obstructing commerce by any means was twenty years (R.13-

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[2] The evidence may be briefly summarized as follows (R. 14-21):

All the defendants named in the indictment were ostensibly representatives of labor unions. The petitioner represented the pipefitters. In 1951, O. R. Burden Construction Company encountered "slow-ups" and other labor activities which resulted in higher labor costs than those for similar work in comparable regions. In 1952, prior to commencing work on an interstate pipe line, a meeting was held with labor representatives to discuss the job. Later, the petitioner, Callanan, had lunch alone with Mr. Burden. Mr. Callanan suggested that Burden pay a percentage to expedite the job. The money was subsequently paid through fictitious companies. For example, payments were made to the petitioner through the fictitious Pipeline Welders' Supply Company, and to defendants Thompson, Porter and Secor through the Washington Equipment and Construction Company. In all $28,000 was paid.

item (7)); that Congress did not intend to subject a person to two penalties for obstructing commerce (R. 13-item (8)); that, therefore, the petitioner should be subject only to a total sentence of 20 years rather than the 24 years imposed (R. 13-item (9)), and, accordingly, the court should reduce the sentence on Count I by four years (R. 12).

The district court denied the petitioner's motion on May 8, 1959 (R. 32-33), in an extensive opinion discussing the legal issues raised (R. 21-31). The court held that it was well established that one charged with conspiracy to violate a federal law, and separately charged with an act which was the object of the conspiracy, could be "sentenced separately on each count or offense" (R. 24) and that the elements of the offenses were different (R. 25). Therefore, since the sentence was not illegal, Rule 35, F. R. Crim. P., was not applicable (R. 27). The court held that the remedy sought under 28 U.S.C. 2255 was premature because the petitioner was not claiming the right to be released, since the sentence on Count I, which was being served, was not invalid, and service of the sentence on Count II might never commence, unless the petitioner committed an act to violate his 5 years probation (R. 31).

This ruling was unanimously affirmed by the Court of Appeals for the Eighth Circuit (R. 33-40). The court of appeals agreed that petitioner could be separately punished for each offense charged and therefore neither Rule 35 nor a proceeding under 28 U.S.C. 2255 was applicable. It further held that in any event neither procedure could be used to raise

an issue as to the sentence which could have been, but was not, raised on appeal.

SUMMARY OF ARGUMENT

The government conceded in its brief in opposition that, if the illegality of a sentence appears from the face of an indictment and judgment, it may be corrected under Rule 35, F. R. Crim. P., even though previously affirmed on direct review. *Heflin* v. *United States*, 358 U.S. 415. On the other hand, the petitioner, who is now released on parole, no longer presses for a reduction of 4 years from one of his consecutive sentences, but urges that consecutive sentences for conspiracy to violate the Hobbs Anti-Racketeering Act and for an extortion under the Act, are improper under a "rule of lenity." It is the government's view that, in determining the intent of Congress in this legislation, consideration must be given to the long-settled doctrine that a conspiracy and a substantive offense committed pursuant thereto are separately punishable, and that there is no indication that Congress intended to change this established rule with respect to anti-racketeering offenses.

A. 1. The cases have consistently treated a conspiracy to commit a crime and the resulting substantive offense as separately punishable. This Court has so decided in cases ranging from *United States* v. *Hirsch*, 100 U.S. 33, through *Pereira* v. *United States*, 347 U.S. 1. These cases include *Carter* v. *McClaughry*, 183 U.S. 365, holding that two violations consisting of conspiracy and the resulting substantive crime, even under one Act, are separately

and cumulatively punishable, and *Pinkerton* v. *United States*, 328 U.S. 640, 643, holding "that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."

2. It is equally well established that there is no merger between the substantive offense and a conspiracy to commit it.

3. The separateness of the crime of conspiracy results from the long-recognized concept that combining for purposes of planning a crime constitutes a danger to the public, sometimes outweighing the commission of the contemplated crime.

B. The legislative history of the anti-racketeering statutes shows no intention to depart from the settled principle that a conspiracy and the resulting substantive offense may support separate sentences. The original Act was passed at a time when not only were conspiracy and substantive offenses separately punished, but when separate crimes defined in one statute were generally regarded as separately punishable. Furthermore, the history of the legislation indicates a decided effort to increase punishment, an intent inconsistent with lenity.

1. The 1934 Act resulted from the Copeland Committee investigations of racketeering. The conspiracy section of the statute was added pursuant to a suggestion in a letter from Attorney General Homer Cummings. The purpose of the Act was to provide, for racketeering, greater penalties and broader terms than those contained in the Sherman Act. In the light of the existing law as to the separateness of conspiracy, the Attorney General must have intended

an increase in the punishment for a conspiracy to violate the Anti-Racketeering Act, since the general conspiracy clause, *supra*, p. 5, then in effect limited the punishment to two years. In view of this specific separate treatment of conspiracy in the Anti-Racketeering Act, regardless of how other sections may be interpreted, it seems evident that the added conspiracy clause was designed to carry a separate punishment.

2. The Hobbs Amendment became law in 1946. Its primary purpose was to legislate a change in interpretation as applied to the type of employee relationship involved in *United States v. Local 807*, 315 U.S. 521. However, more important to this case, the penalty was increased from "from one to ten years," to "not more than twenty years." This cannot be interpreted as consistent with any theory of lenity. Also, the structure of the Hobbs Act tends to suggest that the separate subsections were intended to deal with separate offenses rather than to deal with a single offense.

3. In 1948 the Act was condensed as part of a general revision of the Criminal Code. At the same time many conspiracy clauses relating to other offenses were dropped as being adequately covered by the general conspiracy clause. However, the conspiracy clause in the Hobbs Act was retained since the general clause merely provided a 5-year penalty while the Hobbs Act punishment was greater. Certainly, Congress could have excluded the possibility of punishment for both conspiracy and a substantive offense, as has been done in Wisconsin, but in the

light of the established doctrine special wording would have been essential to depart from the established view that a conspiracy is separately punishable from the resulting substantive crime.

C. The rule of lenity does not alter the result here. Congress intended to deal sternly with the offenses which it condemned. Cf. *Gore* v. *United States*, 357 U.S. 386. There is no special legislative history suggesting one offense rather than two, as this Court found in the Bank Robbery Act, *Prince* v. *United States*, 352 U.S. 322, or the Fair Labor Standards Act, *United States* v. *Universal C.I.T. Credit Corporation*, 344 U.S. 218. There is a clear "controlling gloss", lacking in *Bell* v. *United States*, 349 U.S. 81, 83, a whole century of judicial decisions interpreting a conspiracy and the resulting substantive crime as separate and distinct. Specifically, in the Anti-Racketeering Acts there is every reason to apply the settled principle that combination is itself a crime separate from any resulting crime, and hence separately punishable.

ARGUMENT

In view of the ruling of the court below (*supra*, pp. 7-8), the petition for a writ of certiorari raised the question of whether the fact that a conviction had been reviewed on appeal precluded the petitioner from attacking the legality of consecutive sentences imposed on separate counts of the indictment. On this issue, the government conceded in its brief in opposition that this Court has held that, where it

appears from the face of an indictment and judgment that a sentence is illegal (either because it is excessive or because it imposes double punishment for the same offense), the error is one which may be corrected on collateral attack. *Ex parte Lange*, 18 Wall. 163; *In re Snow*, 120 U.S. 274. Since the enactment of Rule 35, F. R. Crim. P., it has been held that such a motion to correct lies under that rule when the claim of illegality is based on the face of the indictment. Such a motion was considered by the Court even though the judgment had formerly been affirmed on direct review. *Heflin* v. *United States*, 358 U.S. 415.

On the other hand, the petitioner who, in the district court, made an elaborate argument seeking to have four years cut off his prison sentence, rather than merely to have his consecutive suspended sentence removed, no longer presses any such argument.[3] He now urges merely that consecutive sentences could not properly be imposed on both counts of the indictment.

Thus, the only contested issue before this Court is whether conspiracy to violate the Hobbs Act and a substantive offense committed pursuant to that conspiracy are separate offenses for which consecutive sentences may be imposed. The petitioner argues that since, in the Hobbs Act, both the conspiracy and the substantive offenses were created by the same statute, under the "rule of lenity" the conspiracy and

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[3] The petitioner started service of his prison sentence in 1954. He was paroled in April 1960.

substantive offense should be deemed alternative means of violation, rather than separate crimes. It is our view that, in determining the intent of Congress in this legislation, consideration must be given to the long settled doctrine that a conspiracy and a substantive offense committed pursuant thereto are separate. There is no indication in this Act that Congress intended to change this established rule as to the separateness of conspiracy and the substantive offenses.

Congress Intended Conspiracy and Substantive Offenses Under the Hobbs Act To Be Separately Punishable.

A. ***A conspiracy to commit a crime and the resulting substantive offense have long been treated as separate crimes for purposes of punishment.***

1. From *United States* v. *Hirsch*, 100 U.S. 33, in 1879, through *Pereira* v. *United States*, 347 U.S. 1, this Court has consistently recognized that a conspiracy to commit an offense, and the resulting offense, are distinct crimes to be separately punished, except for that limited class of substantive offenses which require, by definition, more than one participant.[4] This has been the conclusion regardless whether the attack was in terms of construction or on the basis of rules of law relating to double

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[4] *United States* v. *Katz*, 271 U.S. 354; *Gebardi* v. *United States*, 287 U.S. 112; *United States* v. *Zeuli*, 137 F. 2d 845 (C.A. 2).

jeopardy or merger of offenses, and notwithstanding variations in the wording or formal position of the various conspiracy clauses.

In *Hirsch*, 100 U.S. 33, this Court held that, for purposes of determining which statute of limitations applied, a conspiracy to violate the revenue laws was an offense under general law rather than under the revenue laws.[5] It was recognized that the crime of conspiracy was distinct from the object of the agreement, the foundation of the conspiracy offense being characterized as a "combination of minds in an unlawful purpose", *supra*, 100 U.S. at 34. The seriousness of the separate offense of conspiracy was recognized in *Callan* v. *Wilson*, 127 U.S. 540, which held that a conspiracy was not a petty offense and hence the constitutional guarantee of trial by jury was applicable. The essential separateness of the punishment for conspiracy was decided in *Clune* v. *United States*, 159 U.S. 590. There, the substantive offense of obstructing the mail carried a maximum fine of $100, while the maximum punishment for the crime of conspiracy was a fine of $1,000 to $10,000, and imprisonment up to 2 years. The Court held that a conspiracy was a separate offense, saying (159 U.S. at 595):

> Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the

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[5] At that time the statute of limitations for revenue offenses was five years while the general statute of limitations was only three years. Cf. 26 U.S.C. 6531(8).

> doing of the act itself, it is a matter to be considered solely by the legislative body* * *.*

The controlling principle, for purposes of the case at bar, was set forth in *Carter* v. *McClaughry*, 183 U.S. 365. There, of four charges in a court-martial, the first two charges were within the same 60th Article of War, which had one punishment clause of a fine or imprisonment. *Id.* 390-392. The first charge was a conspiracy to defraud the United States and the second charge, based upon the same article, was the substantive offense of causing fraudulent claims to be made against the United States. The offenses (*Id.* at 390-392) were separated only by paragraphs and the word "or" (just as in the Anti-Racketeering Act of 1934, *supra*, pp. 3-4). On conviction, Carter was both fined and imprisoned. In an habeas corpus proceeding he contended that he was twice placed in jeopardy as a result of one transaction for which only one punishment could be imposed. This Court held that the fact that the charges grew out of one transaction "made no difference" since each required proof of different facts (*Id.* at 394-395). In upholding the punishment, which was greater than that authorized for any single offense, the Court held (183 U.S. at 394):

> Cumulative sentences are not cumulative punishments, and a single sentence for several offenses, in excess of that prescribed for one of-

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* It was not until the 1948 Criminal Code Revision that Congress made any substantial adjustment in punishment for conspiracy. 18 U.S.C. 371. See also the 1944 amendment, 58 Stat. 752.

> fense, may be authorized by statute. *In re De Bara*, 179 U.S. 316; *In re Henry*, 123 U.S. 372.

Similarly, *Williamson* v. *United States*, 207 U.S. 425, held that the crime of conspiracy is separate and distinct and "without reference to whether the crime which the conspirators have conspired to commit is consummated" (*Id.* 447); and *United States* v. *Stevenson* (*No. 2*), 215 U.S. 200, recognized that the punishment for the crime of conspiracy can be much greater than that which is imposed on a substantive offense—there, only a civil penalty (*Id.* 203). This was summarized by Mr. Justice Holmes in *Heike* v. *United States*, 227 U.S. 131, in answer to the claim that the defendant there, if guilty, was guilty of the substantive crime (227 U.S. at 144):

> At all events the liability for conspiracy is not taken away by its success—that is, by the accomplishment of the substantive offence at which the conspiracy aims. * * *

In *United States* v. *Rabinowich*, 238 U.S. 78, this Court held that even those who could not commit the objective substantive crime—concealing assets by a bankrupt—nevertheless could be guilty of conspiracy which "is a different offense from the crime that is the object of the conspiracy" (*Ibid.* at 85). Furthermore, in conformity with *Hirsch, supra*, this Court applied the general statute of limitations rather than that under the Bankruptcy Act. Significantly, for our purposes, the Court stated, as one reason for applying a different limit to the separate crime of conspiracy that it had (238 U.S. at 88):

> * * * attributed to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different; a distinction whose practical importance in the criminal law is not easily overestimated.

By the time *Pinkerton* v. *United States*, 328 U.S. 640, was decided, it was possible for this Court to conclude (*Ibid.* 643):

> It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. * * *

In *Pinkerton*, the Court described a conspiracy as having "ingredients, as well as implications, distinct from the completion of the unlawful project" (*Id.* 644) and held that since there was no merger the sentence could exceed that imposed for the conspiracy alone.[7]

To like effect is the interpretation of conspiracy and cumulative sentences under the Sherman Act, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 788-789, as well as between court-martial and

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[7] In fact, one of the questions presented in *Pinkerton*, *supra*, was directed toward the problem of the extent of punishment allowable, which is in terms substantially the same as the question at bar. See the Government's Brief, No. 719, O.T. 1945, p. 3:

"Whether on petitioners' convictions upon an indictment charging in one count a conspiracy to violate various provisions of the Internal Revenue Code and in other counts substantive offenses in violation of one of those provisions, they could validly be sentenced on the substantive counts to a term of imprisonment exceeding the two year maximum penalty provided for by the conspiracy statute, which had been imposed upon them on the conspiracy count."

civilian conspiracy in *United States* v. *Bayer*, 331 U.S. 532, 542.

The doctrine of separateness was so well established when this Court decided *Pereira* v. *United States*, 347 U.S. 1, that in connection with the conspiracy count it was stated (347 U.S. at 11):

> It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. * * *

2. Equally well established is the principle that there is no merger between the substantive offense and a conspiracy to commit it. In *Pinkerton*, *supra*, this Court noted (328 U.S. at 643):

> The common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country.

The original objection at common law on the basis of merger was not expressed in terms of "steps in a crime", but was based solely on the procedural differences flowing from trials of misdemeanors—e.g., conspiracy—as compared to trials of felonies. See *Graff* v. *People*, 208 Ill. 312, 320-321, and 2 University of Chicago Law Review 485. Therefore, the normal rule was that a misdemeanor merged into a felony, regardless of whether the misdemeanor was a conspiracy. In any event, it is clear that this doctrine never gained a foothold in the United States in connection with a substantive crime and a conspiracy. See the consistent and extensive list of cases collected in 37 A.L.R. 778 and 75 A.L.R. 1411.

3. The reason for this long recognition of the separateness of the crime of conspiracy, reflected throughout the decisions, is the concept that combining for the purpose of planning a crime is itself an evil which may be greater than the consummation of the crime by one individual. As this Court said in *United States* v. *Rabinowich*, 238 U.S. 78, 88, quoted with approval in *Pinkerton* v. *United States*, 328 U.S. at 644:

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. * * *

Or as Justice Jackson said in his concurring opinion in *Krulewitch* v. *United States*, 336 U.S. 440, 448-449, "to unite, back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer."

B. The legislative history of the anti-racketeering statutes shows no intention to depart from the well-settled doctrine that a substantive offense and a conspiracy to commit it may support separate sentences, but does clearly indicate an intent to punish severely.

The history of the anti-racketeering statutes gives no indication of any intent to depart from settled doctrine of applying separate sentences to the distinct crimes of conspiracy and substantive offense. The Act originated in 1934, at a time when not only

were conspiracies and substantive offenses recognized as separate, but when crimes separately defined in one statute were generally regarded as separately punishable.[8] Beyond this, however, the history of the Act shows that Congress regarded conspiracy to commit crimes under this Act as serious, and dealt separately with that offense. The history also shows a decided effort on the part of Congress to increase the punishment, an attitude of severity rather than lenity.

The origin of the present statute is the Anti-Racketeering Act of 1934. That Act was amended by the Hobbs Anti-Racketeering Act of 1946, and, in turn, the Hobbs Act was codified in the 1948 revision of the criminal code.

1. *The 1934 Act.*

The bill was introduced as one of 13 which resulted from investigations of racketeering by the Copeland Committee (see discussion in *United States* v. *Local 807*, 315 U.S. 521, 528-529). As originally proposed, it contained no conspiracy provision. 78 Cong. Rec. 457-458. The memorandum from the Department of Justice which accompanied the original draft indicated that the proposed bill was designed to provide a substitute for the attempt to prosecute racketeering

[8] E.g. *Burton* v. *United States*, 202 U.S. 344, 377 (agreeing to receive and receiving a bribe); *Morgan* v. *Devine*, 237 U.S. 632 (forcibly breaking and entering with intent to commit larceny and stealing postage stamps); *Albrecht* v. *United States*, 273 U.S. 1, 11 (possession and sale of liquor), and *Blockburger* v. *United States*, 284 U.S. 299 (multiple sentences under the Harrison Narcotics Act).

under the Sherman Act. 78 Cong. Rec. 453.[9] The memorandum read in relevant part:

> This is a proposed Federal antiracketeering statute based on the interstate commerce power.
>
> In the past such persons have been prosecuted in the Federal courts for incidental violations of law, such as mail frauds or income-tax evasions. The nearest approach to prosecution of racketeers as such has been under the Sherman Antitrust Act. This act, however, was designed primarily to prevent and punish capitalistic combinations and monopolies, and because of the many limitations engrafted upon the act by interpretations of the courts, the act is not well suited for prosecution of persons who commit acts of violence, intimidation, and extortion. Furthermore, the Sherman Act requires proof of a conspiracy, combination or monopoly, and it is often difficult to prove that the acts of racketeers affecting interstate commerce amount to a conspiracy in restraint of such commerce, or a monopoly. Moreover, a violation of the Sherman Act is merely a misdemeanor, punishable by 1 year in jail plus $5,000 fine, which is not a sufficient penalty for the usual acts of violence and intimidation affecting interstate commerce.

Following a suggestion contained in a letter from Attorney General Homer Cummings, the bill was amended by the House to include a conspiracy clause,

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[9] This memorandum, signed by Walter L. Rice, Special Assistant to the Attorney General, was also partially reproduced in the Senate Report (S. Rep. No. 532, 73rd Cong., 2d Sess., pp. 1-2) and in pertinent part read on the Senate floor in response to a request for an explanation of the bill (78 Cong. Rec. 5735).

and the penalty was set at from one to ten years, or a fine of $10,000, or both. 78 Cong. Rec. 11403.[10] The letter stated as to this provision that the draft had "added a new provision prohibiting conspiracy as well as the substantive acts." It too expressed the need for heavier penalties, stating:

> The Sherman Antitrust Act is too restricted in its terms and the penalties thereunder are too moderate to make that act an effective weapon in prosecuting racketeers. * * *

In the light of the state of the law in 1934, both as to the separate character of offenses generally, and specifically as to the separateness of the crime of conspiracy, it is inconceivable that, in suggesting that conspiracy be defined in addition to the substantive offenses, the Attorney General thought he was suggesting an alternative method of committing the one offense defined in the statute. Rather, it seems evident that, since the general conspiracy statute at that time provided merely a two-year penalty (*supra*, p. 5), the specific addition of the special conspiracy clause was to increase its punishment from the two-year limit when the conspiracy was directed at a violation of the anti-racketeering statute. Otherwise, the substantive crime could have been punished under the Anti-Racketeering Act and the conspiracy could have been separately punished by only two years, under the then existing general conspiracy provision.

Furthermore, in the light of this specific separate treatment of the clause punishing conspiracy, there

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[10] The Attorney General's letter is contained in the House Report (H. Rep. No. 1833, 73rd Cong., 2d Sess., p. 2).

is no force, as to this conspiracy provision, in the petitioner's argument that various other portions of the statute overlap and hence that the various sections should be interpreted as constituting alternative ways of committing one offense. We do not believe that the substantive offenses overlap to the degree that the petitioner argues. Granted that some phraseology is repetitious and that it is possible to read them to overlap in some instances, it seems evident that the various sections were mainly directed at specific violations which were not necessarily alternatives. Thus, subsections (a) and (b) of Section 2 of the 1934 Act were most probably intended as alternative offenses and stemmed from the bill as originally introduced in the Senate.[11] Subsections (c) and (d) did not directly involve racketeering or hijacking but contemplated offenses, which, while they may many times relate to and go "hand in hand" with the illegal activity contemplated in subsections (a) and (b), actually involve additions or supplements to the commission of racketeering offenses. These latter subsections—(c) or (d)—may be violated by a person who cannot be shown to have "obtained" a "pay off." On the other hand, if the person who violated (a) or (b) also found it necessary to participate in and use the specific means defined in (c) or (d), he committed more than one crime, and thus should properly be subject to cumulative sentences.

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[11] While they can be read to coincide, in part, subsection (a) seems to define recognized traditional types of racketeering; subsection (b), involves the taking of property by force or fear or in the guise of governmental authority.

In any event, whatever may be said as to subsections (a), (b) and (c), it seems evident that the mere fact that the conspiracy provision was inserted as subsection (d) does not alter the clear intent, revealed by specific addition of the conspiracy clause, to make conspiracy separately punishable.

2. *The 1946 Act.*

The Hobbs amendment, which became law in 1946, to a large extent was intended to eliminate the interpretation of the non-applicability of the 1934 Act to such employee relations as those involved in *United States v. Local 807*, 315 U.S. 521. See *United States* v. *Green*, 350 U.S. 415, 418-419. However, for our purposes, a further significant change was made in increasing the severity of punishment "from one to ten years" in the 1934 Act to "not more than twenty years" in the 1946 amendment (see *supra*, p. 3). This penalty increase evoked debate every year the bill was proposed, but attempts to reduce the punishment never succeeded [12] and the bill as finally passed provided for a 20-year penalty for violation of any section. This deliberate increase in severity cannot be reasonably interpreted as consistent with any theory of lenity.[13]

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[12] See, for example, H. Rep. No. 2176, 77th Cong., 2d Sess., pp. 1, 11; H. Rep. No. 66, 78th Cong., 1st Sess., p. 11; 89 Cong. Rec. 3194, 3201, 3205, 3229; 91 Cong. Rec. 11846, 11901-11902.

[13] In fact, Congressman Resa objected to the 1946 amendment as "undertak[ing] to multiply offenses punishable under Federal laws which are also punishable under the laws of the States * * *" 91 Cong. Rec. 11913.

Moreover, the structure of the Hobbs Act tends to meet the argument that the various provisions overlap. That Act read in pertinent part as follows:

> Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

Thus, in 1946 the previous alternatives of (a) and (b) in the 1934 Act became Section 2 which contained all types and forms of "pay-offs" which are recognized as racketeering. Sections 3 and 5 continue the additional crimes formerly in subsections (d) and (c), respectively, of the 1934 Act. Section 4 defines a crime which is an incomplete stage of the offenses proscribed by Section 2 and stemmed from a division originally found in subsection (a). This Section may not have defined a crime which could have been punished in addition to a violation of Section 2, but only defined an offense which would merge with Section 2 on completion. There is no general attempt

statute in the federal Criminal Code so that attempts are punishable only if specifically so declared by Congress. Section 4 was therefore necessary to reach attempts which did not succeed, and we may assume *arguendo* that this is all that Congress intended to reach. But this does not aid petitioner for it is very clear, from the language of Section 5, that Congress intended that, when any scheme of extortion punishable under Section 2 was carried out through actual or threatened physical violence, such physical violence was to be subject to separate punishment. Otherwise, Section 5 would serve no purpose whatsoever. Thus, it cannot be said that the various parts of the Hobbs Act merely alternatively punished elements of the same offense. And considering the established view of conspiracy as a separate crime, as well as the special addition of the conspiracy provision in 1934, it seems evident that the conspiracy provision in Section 3 was, like Section 5, intended to define a separate crime.

3. *The 1948 codification.*

The present Act was enacted in 1948 as part of the revision of the Criminal Code and was condensed as part of the shortening process effected in the revision. The conspiracy provision was undoubtedly kept in the statute because of the penalty clause. The Reviser's Notes as to the general conspiracy statute, 18 U.S.C. 371, stated:

> A number of special conspiracy provisions, relating to specific offenses, which were contained in various sections incorporated in this title,

were omitted because adequately covered by this section. A few exceptions were made, (1) where the conspiracy would constitute the only offense, or (2) where the punishment provided in this section would not be commensurate with the gravity of the offense. * * *

The mere fact that the conspiracy was made punishable by the same statute as that which created the substantive offenses is not enough to impute to Congress an intent to overturn settled principles that conspiracy and the substantive offense are separate. A great number of conspiracy clauses, as in the Hobbs Act, 18 U.S.C. 1951, remain as part of separate statutes.[11] In the light of the established view as to conspiracy law, there was no reason for Congress to believe that any special wording would be

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[11] 15 U.S.C. 1-3, Sherman Anti-Trust Act; 15 U.S.C. 714m (d), offenses in connection with the Commodity Credit Corporation; 16 U.S.C. 831t(c), offenses in connection with the Tennessee Valley Authority; 18 U.S.C. 241, civil rights; 18 U.S.C. 286, defraud the government by claims; 18 U.S.C. 372, impede or injure an officer; 18 U.S.C. 757, escape of prisoner of war; 18 U.S.C. 793(g), 794(c), gather or deliver defense information to a foreign government; 18 U.S.C. 956(a), to injure property of a foreign government; 18 U.S.C. 1201(c), kidnapping; 18 U.S.C, 1792, riot in federal penal institution; 18 U.S.C. 2153(b), 2154(b), 2155(b), 2156(b), offenses in connection with sabotage; 18 U.S.C. 2192, to incite to revolt or mutiny; 18 U.S.C. 2271, to destroy vessels; 18 U.S.C. 2384, 2385, 2388(b), sedition, advocate overthrow of government, or activities affecting armed forces during war; 26 U.S.C. 7237, narcotic violations; 42 U.S.C. 2272, 2273, Atomic Energy Act of 1954; 50 U.S.C. 783, 822, 823(c), Internal Security Act; 50 U.S.C. App. 462, Universal Military Training and Service Act; 50 U.S.C. App. 1963, Displaced Persons Act.

necessary to render conspiracy a separate crime. Rather, special wording would have been necessary if Congress intended that conspiracy not be specially punishable. Certainly Congress could easily change the result by specifically forbidding punishment for both conspiracy and the substantive offenses, as has been done in Wisconsin. See Wisconsin Stat. Ann. § 939.72(2).[15] If such a change is to be made, it should be done directly by the legislature and not by court decision. *United States* v. *Isthmian Steamship Co.*, 359 U.S. 314. And a construction so contrary to established concepts should not be superimposed on the Anti-Racketeering Act under the guise of a rule of lenity.

C. *The rule of lenity does not prevent separate punishment of conspiracy in this case.*

In seeking to ascertain the intent of Congress, the petitioner argues, in effect, that where the legislation does not in terms provide for cumulative sentences, a policy of lenity should apply. The real question, however, is the intent of Congress in *this* Act. As Justice Holmes noted, "an argument that would prevail in one case may be inadequate in another." *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 402. There is no basis for the rule of lenity here, for there is no indication of any attitude of lenity on the

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[15] Wisconsin Stat. Ann. 939.72(2) provides:

"A person shall not be convicted under both:

* * * *

"(2) Section 939.31 for conspiracy and § 939.05 as a party to a crime which is the objective of the conspiracy; * * *."

part of Congress in this Act. The history of the Act shows a desire to make penalties more severe, rather than less. See *Gore* v. *United States*, 357 U.S. 386. Moreover, there is no special legislative history (showing one offense rather than two) such as influenced the interpretation of the Bank Robbery Act (*Prince* v. *United States*, 352 U.S. 322, and *Heflin* v. *United States*, 358 U.S. 415),[16] and the Fair Labor Standards Act (*United States* v. *Universal C.I.T. Credit Corporation*, 344 U.S. 218). As to the problem here, conspiracy and substantive offense, the statute does not come without "controlling gloss" as in *Bell* v. *United States*, 349 U.S. 81, 83. See also *Ladner* v. *United States*, 358 U.S. 169,[17] where the statute was interpreted as ambiguous in purpose and hence dependent upon separate impulses to sustain multiple sentences under one Act.

This statute comes, not only with such controlling gloss as the decisions of lower courts imposing separate sentences for conspiracy have given it, both before and after the Hobbs Act,[18] but, more im-

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[16] No claim was urged in *Heflin* that the conspiracy count there involved could not sustain a separate sentence.

[17] No contention was raised in *Ladner* concerning the concurrent sentence given under the conspiracy count.

[18] *Nick* v. *United States*, 122 F. 2d 660 (C.A. 8), certiorari denied, 314 U.S. 687; *Hulahan* v. *United States*, 214 F. 2d 441 (C.A. 8), certiorari denied, 348 U.S. 856; *Bianchi* v. *United States*, 219 F. 2d 182 (C.A. 8), certiorari denied, 349 U.S. 915; *Callanan* v. *United States*, 223 F. 2d 171 (C.A. 8), certiorari denied, 350 U.S. 862; *United States* v. *Dale*, 223 F. 2d 181 (C.A. 7); *Schm[illegible]* v. *United States*, 237 F. 2d 542 (C.A. 8); *United States* v. *Palmiotti*, 254 F. 2d 491 (C.A. 2).

portantly, with the controlling gloss of a whole century of judicial decisions which, in every type of situation in which the question has arisen, have treated the crime of conspiracy and a substantive offense committed pursuant to that conspiracy as separate and distinct. Whatever may be said of presumed congressional intent to treat as alternates closely related substantive offenses created by one statute, no such argument can be made with respect to conspiracy and substantive offenses. As to those crimes, the separateness of the offenses has too long and too well established a history to be ignored. To repeal so long established and firmly settled a doctrine some specific indication of congressional intent would be necessary. Here not only is there no such indication, but, on the contrary, as we have shown, the materials that are available indicate that Congress intended conspiracy to be separately punishable. And, finally, as pointed out above, the underlying reason for the numerous judicial decisions treating conspiracy as separate from the substantive offense is the concept that combination for criminal purposes can be more dangerous than the consummated act performed individually.

This reasoning applies with peculiar force to the anti-racketeering laws. In the present case, for example, the defendants, persons controlling groups, by combining together could bring to bear on the victim practically all the labor force on the job. Such force makes possible extortion to an extent that no single individual working alone can possibly effectuate. Conspiracy under this Act represents a more potent

threat and one different in kind and nature from mere extortion. There is therefore especially good reason to apply here the settled principle that combination is itself a crime separate from the crime that may result therefrom.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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SEPTEMBER 1960.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1960 564812 307